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TENAGA NASIONAL BHD v. EVERTHROUGH RUBBER PRODUCTS SDN BHD

HIGH COURT MALAYA, TAIPING
NOOR RUWENA MD NURDIN J
[CIVIL SUIT NO: AB-22NCVC-21-10-2017]
B 31 MAY 2025

Abstract – *On calculating the amount of loss of revenue claimed by Tenaga Nasional Bhd ('TNB'), due to a tampering on its electric meter, it is not the duty of the court to make its own calculation. In deciding* C *the amount to be awarded to TNB, the court will refer to the evidence and data as presented by the parties before the court. The questions that can arise, among others, are which evidence of the parties is more probable, and whether TNB has proved its claim on a balance of probabilities.*

D ***UTILITIES:*** *Electricity – Consumption and usage – Claim for loss of revenue – Tampering of meter by private company – Assessment of loss of revenue to be awarded to Tenaga Nasional Bhd ('TNB') – Whether there was non-issuance of notice under s. 38(4) of Electricity Supply Act 1990 by TNB – Whether TNB barred from claiming loss of revenue for inconsistency in amount of loss of revenue claimed* E *– Whether evidence and data presented by TNB's witness more probable than that of private company's witness – Whether TNB proved its case on balance of probabilities*

The plaintiff was an electricity utility company, while the defendant was a private company involved in the business of manufacturing rubber tyres. F Pursuant to the defendant's application, the plaintiff had supplied the defendant's premises with electricity. From an inspection conducted upon an electric meter placed in the premises, the plaintiff discovered that the meter had been tampered with. That caused the plaintiff to issue to the defendant notices of demand twice, to claim for loss of revenue: (i) to claim for G RM7,056,830.61 for the period from 1 September 2007 until 26 December 2011; (ii) to claim and for RM3,430,666.98, for the period from 28 April 2007 until 22 December 2011. The claim in the second notice of demand, was allowed by the High Court. Aggrieved, the defendant filed an appeal to the Court of Appeal. The Court of Appeal dismissed the appeal against the liability for meter tampering but allowed the appeal against the quantum. H The Court of Appeal then ordered the matter to be remitted to the High Court (this court), for an assessment to be conducted to ascertain the amount of loss of revenue to be paid by the defendant. Presently, the plaintiff was claiming for RM3,017,316.49, for loss of revenue from 28 April 2007 to 22 December 2011. During the hearing of the present claim, the plaintiff had I called one witness ('SP1') while the defendant had called two witnesses:

(i) a former employee of the plaintiff, who had worked for 14 years ('SD1'); and (ii) the defendant's plant manager ('SD2'). The issues that arose were whether: (i) the starting date of the undercharged period was as per the plaintiff's claim, or as claimed by the defendant, from 1 February 2010 to 22 December 2011; and (ii) whether, with respect to the computation of the amount to be paid by the defendant, the method of calculation as propounded by the plaintiff or the defendant was more reliable. In resisting the claim, the defendant contended that: (i) there was a non-issuance by the plaintiff of a notice under s. 38(4) of the Electricity Supply Act 1990 ('ESA') prior to the issuance of the demand for the present claim, unlike in the previous two demands. The defendant further argued that the plaintiff may not rely on the *prima facie* presumption under s. 38(4) of the ESA; and (ii) the plaintiff should be barred from commencing the present claim because there was inconsistency in the amount of loss of revenue claimed throughout the three demands against the defendant.

Held (allowing claim; granting plaintiff RM3,017,316.49 for loss of revenue):

(1) The certified written statement under s. 38 of the ESA is to be served as a pre-condition for initiating a civil action. It is not for a suit that is already at the stage of assessment of damages, as in the present claim, which was ordered by the Court of Appeal after finding that the defendant was liable for meter tampering; it was just a re-computation issue to be settled by this court. Therefore, the attempt to re-litigate the issue of liability was disallowed. Nonetheless, even if the plaintiff could not rely on the *prima facie* presumption, the plaintiff could still meet its claim on the balance of probabilities. As the plaintiff had not lost the right of recovery as statutorily accorded under s. 38(3) of the ESA, the defendant's contention was flawed. (paras 8 & 9)

(2) The plaintiff was not precluded from adducing a different (and in fact lesser) amount in its present claim during assessment of damages. This court had been tasked to determine what was the right amount to compensate the plaintiff for its losses. Therefore, the plaintiff should also be allowed to re-look at the data they had based their computation upon and revise the amount accordingly. (para 10)

(3a) SD1 stated that there was no reason given by the plaintiff other than the finding of the sudden drop, for the selected date of 28 April 2007. SD1 opined that, the sudden drop did not, in fairness to the defendant, proved when the tampering took place because the defendant's bills showed more than one instance of sudden drop in electricity usage. However, this evidence had not been reflected in SD1's expert report. Additionally, SD1 had agreed that the party who would know as to when the actual date of the meter tampering had taken place would be

A the defendant. He also agreed that the fact about when the meter tampering occurred had been kept from him by the defendant. (para 14)

(3b) Although SD1 proposed the use of the production method (consumption) as more accurate, he also agreed that the production B report, facts, particulars and figures had never been provided to him by the defendant. These coupled with the findings that, the defendant had agreed that due to a lot of factors, such as factory shutdown and long period of holidays, it was reasonable for the plaintiff to assume that the meter tampering could have occurred on 28 April 2007, and C that SD1's evidence was inconsistent with that of SD2, SD1's evidence was unreliable and less probable as compared to that of the plaintiff. (paras 15-17)

(4) SD2's rather 'honest answers' did not help the defendant's case that the meter tampering happened in 2010, and it was due to the increase D in plant numbers. It did not matter how SD2 knew about the meter tampering as he was not there then, but after he joined the defendant, he had become acquainted with the plaintiff's claim. The court could not ignore the truth that was staring it in the face, that the meter tampering happened before 2010, most likely in 2007. The burden E was on the plaintiff to prove such on a balance of probabilities. From the evidence, it was found that the plaintiff's version on this was more probable than that of the defendant. (paras 20 & 21)

(5) SP1 stated that the undercharged period started from 28 April 2007 as there was a continuous sudden drop in electricity consumption during F off-peak, *ie*, from 332,771kWh (bill dated 28 April 2007) to 262,326kWh (bill dated 28 May 2007). Prior to the bill dated 28 April 2007, the recorded electricity consumption was 353,184kWH (bill dated 28 March 2007) which dropped to 332,771kWh (bill dated 28 April 2007). SP1 explained that the drop in electricity consumption G had to be consistent at the bottom of the graph (exh. P2). In choosing to refer to consumption during off-peak as compared to peak, SP1 told that the sudden drop was more consistent and apparent during off-peak (exh. P2). Pursuant to this and SD2's admission that the meter tampering occurred in 2007, it was fair and reasonable for the plaintiff H to choose 28 April 2007 as the commencement date of the undercharged period. (paras 23-25)

(6a) SD1 had produced an alternative calculation, which arrived at the sum of RM977,195.96. In arriving at that, SD1 had used the average method for a period from 1 February 2010 until 22 December 2011. I Comparing the evidence by SD1 and SP1, it was found that the calculation method used was similar, *ie*, the average method. SD1 had

contradicted himself by stating that he was in favour of the production method. Moreover, SD1's evidence was flawed because when comparing the charts, for instance the off-peak consumption chart (exh. P2), it could be seen that in 2007, the consumption was higher than in 2010 whereas the defendant claimed that their plants had grown from one to three. (paras 34 & 35)

(6b) Looking at the graphs, there was a steep decline from 28 April 2007 onwards until the bar rose on 1 September 2009; this was the period of consumption after the meter tampering with only one production plant. When the bar rose on 1 September 2009, this was when the defendant's second and/or third plant was in operation. However, with three plants in operation, the defendant's electricity consumption after 1 September 2009 was similar to the usage during the period of consumption pre-28 July 2007 when only one plant was in operation. The defendant had found a way 'to save' on electricity and was able to expand its plants so that it could produce more but at the same time kept its electricity bill within almost the same amount prior to 28 April 2007. (para 36)

(7) It is not the duty of the court to make its own calculations on the loss of revenue that the plaintiff may claim. It would be based on evidence and data presented by the parties before the court, and which evidence was more probable and whether the plaintiff had proved its claim on a balance of probabilities. The defendant's evidence was fraught with difficulties and inconsistencies. As such, the plaintiff's version was more probable than that of the defendant. For that reason, the plaintiff had proved the amount of RM3,017,316.49 as fair and reasonable to be awarded to it. (para 37)

Case(s) referred to:

Tenaga Nasional Bhd v. Bright Rims Manufacturing Sdn Bhd [2015] 1 CLJ 521 CA ***(refd)***
Tenaga Nasional Bhd v. Dunia Raya Enterprise Sdn Bhd [2015] 6 CLJ 751 CA ***(refd)***
Tenaga Nasional Bhd v. Evergrowth Aquaculture Sdn Bhd & Other Appeals [2021] 9 CLJ 179 FC ***(refd)***
Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd & Other Appeals [2018] 3 CLJ 557 FC ***(dist)***
Voo Nyuk Fah & Anor v. Lam Yat Kheong & Anor [2012] 5 CLJ 229 CA ***(refd)***

Legislation referred to:

Electricity Supply Act 1990, s. 38(3), (4)
Evidence Act 1950, s. 18

For the plantiff - Waffy Azman & Wardah Yunus; M/s Azmi & Assocs
For the defendant - M Rajenthira Kumar & Hiu Yeat Fong; M/s Kumar Assocs

Reported by Syamim Ariffin

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JUDGMENT

Noor Ruwena Md Nurdin J:

Introduction

B **[1]** This grounds of judgment has been prepared in respect of an appeal to the Court of Appeal by Everthrough Rubber Products Sdn Bhd (the defendant) against the decision of this court on 22 January 2025 whereby the court allowed the plaintiff, Tenaga Nasional Berhad's claim of RM3,017,316.49, (for loss of revenue from 29 April 2007 to 22 December 2011) after a two-days' hearing was conducted on 22 March 2024 and C 15 August 2024. The hearing was in regard to an assessment on the plaintiff's revenue loss caused by the defendant, pursuant to a Court of Appeal order dated 22 December 2021 as follows:

> Tindakan ini dikembalikan ke Mahkamah Tinggi untuk taksiran kerugian hasil yang ditanggungi oleh Responden.

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Background

[2] The suit was brought by the plaintiff which has a branch in Taiping against the defendant, a private company which has its registered address in Ipoh. The business of the defendant was manufacturing rubber tyres in E Kawasan Perindustrian Kamunting, Taiping. It was an agreed fact that the defendant had applied to and was approved electricity supply by the plaintiff in accordance with the contract for electricity supply. An inspection conducted by the plaintiff upon its meter installed in the defendant's premises showed that the meter had been tampered with. A notice of demand was F issued on 25 October 2012 and 18 February 2016 for an amount of RM7,056,830.61 for the period of 1 September 2007 to 26 December 2011. later, a notice of demand dated 22 February 2017 and 16 June 2017 were issued for an amount of RM3,430,666.98 for the period of 28 April 2007 to 22 December 2011.

G **[3]** These were the agreed facts in the earlier trial where the High Court found that the defendant was liable for tampering the plaintiff's meter and on 30 January 2019, the plaintiff's claim for liability of tampering and quantum against the defendant was allowed by the High Court. The plaintiff was awarded RM3,430,666.98 (inclusive of costs of rectification of the meter) for the period between 28 April 2007 to 22 December 2011. The defendant filed H an appeal to the Court of Appeal. However, on 22 December 2022, the Court of Appeal dismissed the appeal against liability but allowed the defendant's appeal on quantum and ordered that an assessment be conducted to ascertain the plaintiff's lost revenue. During the hearing on the assessment of damages before me, the plaintiff called only one witness to prove its claim whereas I the defendant called two witnesses on its behalf. The list of witnesses was as follows:

(i) Syed Ahmad Ridzuan bin Syed Isa (SP1);

(ii) Poongavanam a/l Kutty (SD1); and

(iii) Shunmugam a/l Krishnan (SD2).

[4] Bundle of documents referred to by the court were:

(i) plaintiff's bundle of documents – PBOD1;

(ii) plaintiff's bundle of documents (2) – PBOD2;

(iii) defendant's bundle of documents – DBOD;

(iv) graph on the comparison of defendant's consumption (KWH Peak) before and after rectification - PBOD1, p. 13 (P1);

(v) Graph on the comparison of defendant's consumption (KWH Off Peak) before and after rectification - PBOD1, p. 14 (P1); and

(vi) graph on the comparison of defendant's consumption (KWMD) before and after rectification - PBOD1, p. 15 (P1).

[5] After the hearing was completed, the court considered the submissions and evidence adduced by the parties in order to arrive at Its decision. This grounds of judgment contains my reasons for allowing the plaintiffs' claims including the costs of rectification of the tampered meter.

Evaluation And Findings Of The Court

[6] The assessment of damages hearing was ordered as there was a significant error in the computation of the plaintiff's loss of revenue in the period between 28 April 2007 to 22 December 2011. The amount of RM7,056,830.61 In fact was reduced to RM3,430,666.98 even before the first suit was commenced. The amount of RM3,017,316.49 awarded by this court was based on the computation by the plaintiff in their preparation for the hearing on assessment of damages as stated by SP1.

[7] However, during the assessment of damages hearing, I noted that there was an attempt to re-litigate the liability of the defendant when questions in respect of non-issuance of notice under s. 38(4) of the Electricity Supply Act 1993 ("ESA") was raised by the defendant for the present claim before the demand by the plaintiff, unlike in the previous two demands. The defendant argued that TNB cannot rely on the *prima facie* presumption under s. 38(4) of ESA by relying on the cases of *Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd & Other Appeals* [2018] 3 CLJ 557; [2018] 3 MLJ 141 and *Tenaga Nasional Bhd v. Dunia Raya Enterprise Sdn Bhd* [2015] 6 CLJ 751.

[8] I agreed with the plaintiff's submissions that the Court of Appeal judgment in *Dunia Raya*'s case (*supra*) specifically stated that the certified written statement under s. 38 of the ESA is to be served as a pre-condition for initiating a civil action. It is not for a suit that is already at the stage of

assessment of damages as in the present case, which was actually ordered by the Court of Appeal after finding that there was liability of the defendant in tampering the plaintiff's meter; it was just a re-computation issue to be settled by this court. Therefore, I disallowed any such attempt to re-litigate the issue of liability. Likewise, the Federal Court decision in *Ichi-Ban*'s case (*supra*) may be distinguished because it dealt with a post-trial appeal and it did not involve facts like in the present suit.

[9] Assuming the plaintiff could not rely on the prima facie presumption due to an absence of s. 38(4) notice for the present claim, the plaintiff would still be able to meet its claim on a balance of probabilities: *Ichi- Ban*'s case (*supra*). Therefore, following the *Ichi-Ban*'s case (*supra*), the plaintiff did not lose the right of recovery statutorily accorded under s. 38(3) of the ESA. The defendant's contention was thereby flawed.

[10] The defendant, to show that the plaintiff was inconsistent in its stand, also raised the differing amounts claimed previously by the plaintiff (RM7,056,830.61 and RM3,430,666.98) and that this should, in effect, bar the plaintiff from adducing its present claim for RM3,017,316.49. In my view, the plaintiff is not precluded from adducing a different (and in fact lesser) amount in its present claim during the course of assessment of damages. This court has been tasked to determine what is the right amount to compensate the plaintiff for its losses. Therefore, the plaintiff should also be able to re-look at the data they have based their computation upon and revise the amount accordingly: *Tenaga Nasional Bhd v. Bright Rims Manufacturing Sdn Bhd [2015] 1 CLJ 521*.

Issues To Be Tried

[11] The issues to be decided by this court then were:

(i) starting date of the undercharged period; and

(ii) computation of amount to be paid by the defendant.

Commencement Date Of The Undercharged Period

[12] The plaintiff's claim in the present hearing was for RM3,017,316.49, for loss of revenue from 29 April 2007 to 22 December 2011. But the defendant contended that the starting date of the undercharged period should be from 1 February 2010 to 22 December 2011 (refer to Q&A 17 of SD1's witness statement PSD1) below:

> Q: Mr Poonga, looking at the bar Chart (see page 13 of IDP) and other documents made available to you, in your opinion, which of the sudden drop dates would best indicate the start of tampering?
>
> A: In my opinion, the sudden drop for the billing month of 1 February 2010, best indicates the start of tampering and as such to be taken as the starting date to assess the loss of earnings for the plaintiff. Therefore, the period of back billing is from 1 February 2010 to 22 December 2011. The reason for my opinion are as follows:

(a) Percentage dropped on 1 February 2010 for peak is 22%, off peak is 27%, and KWMD is 7.77%;

(b) Percentage dropped on 28.3.2007 for peak is 8.25%, off peak is 5.78%, and KWMD is 4.56%.

[13] SD1 was the defendant's expert witness who gave evidence on the calculation of the lost revenue. He was an ex-employee of TNB and he said his "expertise is just the experience with the TNB on these matters". He said he was with TNB for 14 years. In SD1's cross-examination, he admitted that the defendant did not give him the actual date of the meter tampering. So, in effect it would appear that he agreed with the difficulties of obtaining the actual date of meter tampering from the consumer (the defendant) as the Federal Court had stated in *Ichi-Ban*'s case (*supra*). In reply to counsel for the plaintiff, SD1 agreed that the reason as to why he chose 1 February 2010 was because the percentage was higher compared to the percentage drop on 28 April 2007. But he also agreed that on 1 September 2007, the percentage drop was 31%.

[14] SD1 stated further that there was no reason given by the plaintiff other than finding of sudden drop, for the selected date of 28 April 2007. His opinion was that sudden drop did not, in fairness to the defendant, prove when the tampering took place because the defendant's bills showed more than one instance of sudden drop in the electricity usage. In P1 (p. 13 of PBOD1), there were sudden drops on 1 September 2007, 1 September 2008, 1 September 2009 and 1 February 2010. This witness' evidence in questions 10, 13 to 24 of his witness statement was not reflected in his expert report as he admitted. Additionally, he agreed in cross-examination that the party who would know as to when the actual date that meter tampering had taken place would be the defendant. He agreed that the fact about when the meter tampering happened was kept from him by the defendant. Interestingly, SD1 was proposing that the use of production method (consumption) was the more accurate method and yet he agreed that the production report, facts, particulars, figures, has never been provided to him by the defendant.

[15] On the issue of a sudden drop in the percentage of use (peak or off-peak), SD1 explained that a sudden drop may be due to a lot of factors such as factory shutdown and long period of holidays. In cross-examination, he was asked by counsel for the plaintiff:

Q: Okay, so your answer just now, shut down, long period of holidays. And you say long period of holiday, say for example Chinese New Year 2 weeks. Now have a look at page 14. The sudden drop happened more than 2 weeks right? It's actually few months, more than 3 months. Do you agree?

A: Agree, ya.

Q: Agree? So I put to you rising from your answer that sudden drop can happen due to festive season factory shutdown, your answer does not eliminate the fact that meter tampering has happened on 28 April or 28 May 2007. Do you agree?

A: Agree

Q: Agree. Therefore, given that you have agreed, I put it to you that it is reasonable for TNB to assume that an act of tampering, an act of meter tampering has happened on 28 April 2007. Agree?

A: Agree.

(emphasis added)

[16] SD1 was asked that the date he chose for the calculation of the back-billing would shorten the period that the defendant would be charged for the lost revenue due to the meter tampering as follows:

Q: So my question, because in question and answer number 15, you list down 4 sudden drops. Okay, So my question to you, what would be the calculation for the other sudden drops? What would be the percentage drop for the other sudden drops?

A: I could've done calculations earlier lah, but not for here.?

Q: So that is why, I am asking you just now, do you agree with me that there are other calculations, there are other sudden drops in which the percentage drop is higher than 22% as stated in your question and answer number 17. Do you agree?

A: Agree

Q: Agree. Therefore, I put it to you, the reason, because it is no longer about percentage, because you mentioned that there are other sudden drops in which the percentage drop are basically higher than 1st of February 2010. So it's no longer about percentage. So I put it to you that the reason as to why the date 1 st of February 2010 was chosen by you was not because of the drop percentage, but rather because it will shorten the period of back billing. Do you agree?

A: No, it is for sudden drop.

Q: And do you agree with me, that by shortening the back billing period, it will cause the defendant to pay lesser amount to TNB. Do you agree?

A: The amount? Yeah agree.

[17] Although SD1 tried to justify his answer that the sudden drop chosen of 1 February 2010 was more reasonable, however I found that he contradicted himself on many occasions as can be seen in the notes of evidence and therefore, I found that his justification was unreliable and less probable than the plaintiff's justification as explained by SP1, which I will

elaborate later. SP1 explained that the period from 1 May 2012 to 1 August 2012 (*ie*, period of 92 days after the rectification of meter tampering) was chosen as it would be fair to both the plaintiff and defendant (given that there was a high as well as low electricity consumption during that time).

[18] But before elaborating further on SP1's evidence, I also found that SD1's answer contradicted that of SD2 on the issue of the commencement date of the meter tampering. The defendant alleged that the backbilling period should start from 2010 because the defendant purchased two additional plants in the year 2010 and 2011 respectively. Therefore, according to DW2 who was the defendant's plant manager, this ought to form the basis for the plaintiff's backbilling calculation to begin from the year 2010. However, in cross-examination when he was asked about when the meter was tampered with, his answer was as follows:

Q: Just just one more, I think I'm almost done. Mr Shunmugam, I'm sure you're aware that in this case, the fact that the meter has been tampered, that one is settled.

A: Ya.

Q: Yeah

A: That one, that one no excuse lah, sure.

Q: Alright, okay. So my question to you, will you agree with me that the party who would know the exact date, the exact date that the act of tampering happened would be the defendant. Do you agree?

A: You want to know the exact date?

Q: Ya ya, my question to you, the party who should know would be the defendant.

A: For your information I was not there when they were doing the tampering.

Q: Alright, very well. That's all Yang Arif.

A: It was 2007, so I am not there. So I really don't know about that.

(emphasis added)

[19] Then counsel for the defendant re-examined him, and afterwards, I had asked him a question before I released the witness. His reply was as follows:

Q: Alright. I do not have any other questions Yang Arif. Could I ask for the witness to be released? Unless Yang Arif has got any other questions.

YA: Ya, just something there. At the last question, of the cross just now. You said you were not there during the tampering?

A: No, of course I'm not. I joined the company 2010, Yang Arif.

YA: 2010 eh. So that means you agree that it happened before 2010?

A: Yes.

(emphasis added)

[20] This witness' answer, who was the defendant's plant manager, no less, supported the plaintiff's contention that the meter tampering must have happened before 2010, and most likely in April 2007 when they detected the sudden unexplainable drop upon inspection on the defendant's premises. His rather 'honest answers' did not help the defendant's case at all that the meter tampering happened in 2010 and that was because of the increase in plant numbers. He admitted that the meter tampering was inexcuseable when he said "That one, that one no excuse lah, sure". The important thing was this person was a high-ranking personnel member of the defendant's and he told the court that the meter tampering happened before his time, *ie*, before he joined the company in 2010.

[21] In my view, it did not matter how SD2 knew about the meter tampering because he was not there then, but eventually after he joined the company, he became acquainted with the plaintiff's claims against the defendant. Therefore, the court could not ignore the truth that was staring in its face, that the meter tampering happened before 2010 and it was likely in 2007. The burden was on the plaintiff to prove on a balance of probabilities that the meter tampering occurred sometime in April 2007 and from this evidence, I found that the plaintiff's version was more probable than the defendant's on the likely period when the meter was tampered with. I found that SD2 was acquainted with the facts of the plaintiff's claim against the defendant from this evidence:

Q: I was keeping in the mind, so I thought I can.

YA: You want to clarify something?

A: Clarify something.

YA: Which question was that?

A: On question 10.

YA: Oh okay, your own answer ya?

A: Ya.

YA: Ya, so what is the..

A: Well TNB an established company with professional accountants and everyone. How come there were 3 bills they were issuing to the defendant?

YA: There were what?

A: One claim, second claim and third claim?

YA: You mean the 7 million?

A: Ya.

A: Put a good amount la Yang Arif. Bagi yang bagus punya untuk kita.

[22] The party who would precisely know as to when the tampering took place would be the defendant. However, apart from DW2's admission above, the defendant itself never offered any information regarding the actual date of the meter tampering at the defendant's premises. The defendant's submission was also silent on this fact that the defendant never gave any date when the meter was tampered with. Hence, it was not wrong for this court to infer that they had knowledge of the tampering because they dealt with their utility bills and would have known that their monthly electricity bill had suddenly decreased. Anyway, the court only had to deal with the computation of lost revenue suffered by the plaintiff as a result of the defendant's breach of the electricity supply contract.

[23] In SP1's witness statement (marked as (PSP1), he stated that the backbilling period started from 29 April 2007 as there was a continuous sudden drop in electricity consumption (kWh) during off-peak at the defendant's premises, *ie*, from 332,771kWh (bill dated 28 April 2007) to 262,326kWh (bill dated 28 May 2007). Prior to the bill dated 28 April 2007, the recorded electricity consumption was 353,184kWh (bill dated 28 March 2007) which dropped to 332,771kWh (bill dated 28 April 2007). For instance, SP1 explained the sudden drop as follows, in regard to electricity consumption during off peak at the defendant's premises:

20. S: Mengapa pengiraan amaun terkurang caj tersebut bermula pada 29/04/2007?

J: Ini adalah kerana terdapat penurunan ketara (sudden drop) yang berturut-turut di dalam penggunaan bekalan elektrik (kWh) ketika Off Peak di premis Defendan tersebut iaitu daripada 332,771 kWh (bagi bil bertarikh 28/04/2007) dan juga sebelum itu 353,184kWh (bagi bil bertarikh 28/03/2007) kepada 262,326kWh (bagi bil bertarikh 28/05/2007) yang mana penurunan ketara ketika waktu malam ini (sudden drop) seharusnya menunjukkan suatu pengusikan telah berlaku.

21. S: Sehingga bila pengiraan amaun terkurang caj dibuat?

J: Pengiraan amaun terkurang caj dibuat sehingga 22/12/2011.

[24] SP1 explained in his cross-examination that the drop in electricity consumption has to be consistent at the bottom of the graph (as demonstrated in exh. P2). In choosing to refer to consumption during off peak as compared to peak, SP1 told the court that the sudden drop was more consistent and apparent during off peak (as can be seen in Exhibit P2). The witness stated in re-examination:

S: Kemudian, dia ada rujuk di muka surat 14, Ikatan Dokumen PBOD 1. Soalan yang ditanya adalah ada tarikh-tarikh lain yang ada penurunan berturut-turut? Ya? Encik Syed jawab tak setuju dan Encik Syed jawab ada tarikh yang lain tak sesuai, boleh jelaskan.

A J: Ya, tak sesuai untuk tarikh-tarikh lain disebabkan pada 29 haribulan 4, maknanya 28 haribulan 5, 2007 kita dapat sudden drop 3 bulan berturut- turut dan seterusnya drop secara konsisten sehingga tindakan pembetulan dibuat oleh TNB. And then selepas tindakan pembetulan dibuat oleh TNB, so penggunaan naik.

B **[25]** Pursuant to the evidence available before this court and in light of DW2's clear admission in regard to the period of tampering being in 2007, it was fair and reasonable for the plaintiff to choose the commencement date of the backbilling period as 29 April 2007 rather than the date proposed by the defendant on 1 February 2010. I have reproduced the relevant section of
C the Evidence Act 1950 wherein s. 18 provides for admission by party to proceeding, his agent or person interested, as follows:

18. (1) Statements made by a party to the proceeding or by an agent to any such party whom the court regards under the circumstances of the case as expressly or impliedly authorized by him to make them are
D admissions.

(2) Statements made by parties to suits, suing or sued in a representative character, are not admissions unless they were made while the party making them held that character.

Computation Of Amount To Be Paid By The Defendant

E **[26]** The general principles from the case laws cited are that the plaintiff:

(i) is entitled to determine the method for calculation as long as it is reasonable and fair;

(ii) may use approximation or estimation method provided it is reasonable
F and fair; and

(iii) may use the guidelines prescribed by the energy commission as a guide in computation of lost revenue due to meter tampering by its client (the defendant).

G **[27]** SP1 explained in his witness statement that there were three main components when assessing the plaintiff's loss of revenue, namely:

(i) the average consumption at the defendant's premises;

(ii) the calculation for the under-billing amount; and

H (iii) the operation and miscellaneous costs.

[28] SP1 testified that TNB has adopted the average method (kaedah purata) in its calculations. The average method used by SP1 is prescribed in the guidelines issued by the Energy Commission (Suruhanjaya Tenaga), that is, "garis panduan prosedur tuntutan kerugian-kerugian hasil oleh pemegang
I lesen bagi kes-kes penggunaan elektrik dengan curang" as reproduced below:

5.2.1 Kaedah Purata

1. Kaedah tuntutan amaun kerugian hasil boleh dibuat dengan menggunakan kaedah purata sebelum atau selepas kes ditemui. Pengiraan bagi kaedah purata adalah seperti berikut:

(a) mengambil penggunaan purata tiga bulan bil elektrik berturut-turut yang paling hampir untuk diambil kira bagi mana-mana penggunaan yang tinggi sebelum penurunan mendadak (sudden drop) dikenalpasti; atau

(b) *sekiranya perenggan (a) tidak dapat dilaksanakan, pengiraan boleh dilakukan dengan mengambil penggunaan purata tiga bulan atau sekurang-kurangnya satu minggu penggunaan selepas tindakan pembetulan dilakukan bagi mana-mana penggunaan yang tinggi selepas kes penggunaan elektrik secara curang ditemui.*

(ii) Selepas pilihan dibuat pada perenggan (I) di atas, maka kaedah pengiraan seperti di bawah hendaklah digunakan:

(a) Dapatkan jumlah bilangan hari penggunaan bagi tempoh yang diambil kira.

(b) Dapatkan purata penggunaan sehari dengan mengira:

$$\text{Purata kWj (sehari)} = \frac{\text{Jumlah unit penggunaan tiga (3) bulan}}{\text{Bilangan Hari Penggunaan}}$$

c. Pengiraan pengebilan ke belakang boleh dibuat dengan menggunakan formula seperti di bawah:

$$\text{Purata kWj sebenar} = \text{Purata kWj sehari} \times \text{bilangan hari*}$$

* [tarikh bacaan bulan berkenaan] - [tarikh bacaan di mana penurunan mendadak dikenal pasti]

Jumlah kWj terkurang dibil
= Jumlah kWj sebenar - jumlah kWj yang telah dibilkan untuk tempoh bilangan hari*

Jumlah kWj terkurang dibil
= Jumlah kWj terkurang bil x kadar tarif pada tempoh kecurian

[29] I refer to the evidence of SP1 on how he derived the amount of RM3,016,523.99 which the defendant owed the plaintiff as follows.

16. S: Bagaimanakah pengiraan amaun terkurang caj dilakukan dalam pengiraan tersebut?

J: Di dalam kes ini, pengiraan bil kebelakang dibuat berdasarkan pengiraan purata penggunaan selepas kejanggalan dikesan iaitu khusus bagi penggunaan kWh Peak, kWh Off Peak dan kWMD.

Bagi tujuan penyediaan pengiraan amaun terkurang caj ini, saya merujuk kepada dokumen 'Register Reading History' yang mana dokumen ini mengandungi maklumat berkenaan bil-bil elektrik yang telah dikeluarkan oteh Plaintif (sepertimana di muka surat 7 hingga 10, Ikatan Dokumen Plaintif).

Seterusnya, bagi membuat pengiraan amaun terkurang caj tersebut, saya akan mengambil jumlah bilangan hari bagi bit-bil bulanan dan didarab dengan purata penggunaan elektrik iaitu 12,839.761 kWh (Peak) dan 13,207.837kWh (Off-Peak) dan juga mengambil kira 1655.333kWMD bagi mendapatkan jumlah penggunaan kWh yang sebenar berdasarkan pelarasan yang dikira bagi purata penggunaan dari 01/05/2012 hingga 01/08/2012.

Sebagai contoh, bagi bil yang dikeluarkan bertarikh 01/01/2009, jumlah bilangan hari bagj bil tersebut adalah 31 hari dan ia kemudiannya didarab dengan 12,839.761kWh, maka jum]ah penggunaan kWh yang sebenar adalah 398,032.587 kWh bagi Peak. Manakala 31 hari didarab dengan 13,207.837 kWh pula, jumlahnya adalah 409,442.946kWh bagi Off-Peak. KWMD pula adalah purata bagi 3 bulan seperti yang dinyatakan di atas iaitu 1655.333kWMD.

Oleh yang demikian, jumlah penggunaan (RM) yang tidak dibilkan (kerugian hasil) adalah. [398,032.587kWh (Peak) x RM0.296 (tarif)] + [409,442.946kWh (Off-Peak) x RM0.182 (tarif)] + [1655.333kWMD x RM30.80 (tarif bagi kWMD)] = RM243,320.52.

Manakala bil serahan bagi bil bertarikh 01/01/2009 tersebut adalah sebanyak RM125,872.53. Maka, kerugian hasil yang telah ditanggung oleh Plaintif bagi bil bertarikh 01/01/2009 adalah RM243,320.52 - RM125,872.53 = RM117,447.99.

Begitulah seterusnya kaedah pengiraan amaun terkurang caj yang dilakukan sehinggalah ke tarikh 22/12/2011. Maka, berdasarkan kepada pengiraan bil kebelakang dari 29/04/2007 ke 22/12/2011, saya dapati jumiah perbezaan (RM) yang tidak dibilkan adalah sebanyak RM3,016,523.99.

[30] It was submitted by the plaintiff that based on the testimony of SP1, the following can be deduced:

(i) firstly, to obtain the average electricity consumption (per day), SP1 calculated the average consumption of electricity at the defendant's premises from 1 May 2012 to 1 August 2012 (a period of 92 days after the rectification of meter tampering). This was done by dividing the total electricity consumption for the said three months with the total number of days in those months;

(ii) secondly, the average consumption of electricity (per day) was multiplied by the total number of days in the monthly bills throughout the backbilling period. This would give the estimation on the actual amount of electricity consumption if the tampering never took place;

(iii) thirdly, the amount of electricity that could not be billed was calculated by taking the difference between the actual amount of electricity consumption and the electricity consumption that was billed throughout the backbilling period; and

(iv) lastly, the said difference was multiplied by the tariff rate during the tampering period. This gave rise to a sum of RM3,016,523.99 which is the amount that TNB could not bill during the tampering period.

[31] The plaintiff submits further that in line with case laws, it is not mandatory to use the energy commission guidelines and the ESA is silent on the methodology to be used by TNB to calculate the loss of revenue it suffers due to meter tampering. However, considering the inherent difficulties which come with claims involving meter tampering, the Federal Court has recognised these and acknowledged that Parliament has left the process of ascertainment of lost revenue calculation to TNB: *Tenaga Nasional Bhd v. Evergrowth Aquaculture Sdn Bhd & Other Appeals* [2021] 9 CLJ 179; [2021] 5 MLJ 937. In that case, the Federal Court stated further:

> ... The same issue was raised in Ichi-Ban and this is what this court had to say:
>
> > [71] According to the learned counsel, as the Act is silent on the methodology to be used by TNB to calculate the loss of revenue suffered due to meter tampering, Parliament has left the process of ascertainment to TNB because of the difficulties inherent in these types of claims. It is important to appreciate the reality of the situation under which the claim is made. *In a mater tampering case, all the information is with the consumer because the incident takes place at his premises. In most cases, the consumer will be uncooperative.* The High Court in the *Ichi-Ban* case recognized this when it observed as follows:
> >
> > > The Legislature has taken cognizance of the fact that in a claim under section (*sic*) 38(3) 'the plaintiff has to work very much in the dark to figure out the loss as all particulars of the actual and real usage of the electricity is with the defendant.
> > >
> > > ...
> >
> > [86] Reverting to the issues raised relating to the calculation point, due to the nature of the claim, we appreciate that there may be difficulty in obtaining the evidence for the claim under s. 38 of the Act. Nevertheless, in our view, it would be unwise for us to use this occasion to say anything which might be taken as specifying or limiting the nature and extent of the evidence necessary to establish a claim for loss of revenue under s. 38 of the Act. *Where precise evidence is available, as for example if there is a special device to measure the loss of revenue due to tampering of electricity supply, naturally the court expects to have it, but where it is not the court must do the best it can. In other words, there could be other evidence in lieu of precise evidence*

A *for example, approximation or estimation may be used provided it is reasonable and fair. This would depend on the quality of the evidence adduced in court to support that approximation or estimation*. In light of what we have said thus far, we find it unnecessary to answer the two questions posed.

(emphasis added)

B

[32] In submissions, this court was referred to other *TNB* cases where the average method was used to determine the lost revenue such (refer to written submissions and bundle of authorities).

[33] In the case of *Voo Nyuk Fah & Anor v. Lam Yat Kheong & Anor* [2012] C 5 CLJ 229, the Court of Appeal had explained on the law in respect of awarding damages as follows:

In awarding damages, be it for breach of contract or in the commission of tortious act, the principle of "restitution in integrum" applies. In common parlance, it means that damages in terms of monetary D compensation can be awarded to replace an injured party in the same or original position occupied (or enjoyed) by him before the occurrence of the injury or wrongful act. See *Livingstone v. Rawyard Cool Co* [1990] 5 App. 25 which was referred to in *Subramaniam Paramasivam & Ors v Malaysian Airlines System Bhd* [2002] 1 CLJ 230.

E **[34]** The defendant contended that to award the plaintiff the amount of RM RM3,017,316.49 which it claimed would be an unjust enrichment for the plaintiff. Therefore, on behalf of the defendant, in Appendix 4 of SD1's affidavit and expert report (marked as D1 and D1A respectively), SD1 sought to produce an alternative calculation in the sum of RM977.195.96 by using the average method for a period beginning from 1 February 2010 until F the rectification date of the meter tampering on 22 December 2011. This was despite his evidence that he said it was not accurate for the plaintiff to use the average method. The basis for the defendant's selected period was on the alleged percentage drop on 1 February 2010 and that the defendant had purchased additional plants in the year 2010 and 2011 respectively. He said G that the plaintiff's selection of the 92 days period of average usage between June 2012 to August 2012 was incorrect because they did not reflect the defendant's usage of electricity and therefore, the loss of earning determination was not the true assessment. In Q15, SD1 replied that "*As for the period of tampering, I am very certain to state that there is no concrete or* H *justifiable proof of when the tampering had taken place. It is all based on assumption. Nevertheless, the assumption must be free from justifiable contradiction"*.

[35] In arriving at the amount of RM977,195.96, SD1 had used the average method for a period that begins from 1 February 2010 until the rectification I date of the meter tampering (22 December 2011). When I compared the evidence of SP1 and SD1, I found that the method of calculation was the

same, *ie*, average method. Therefore, he had contradicted himself by saying that he was not in favour of the average method as opposed to the production method. Moreover, I found that SD1's evidence was flawed because when comparing the charts, for instance the off peak consumption chart at p. 14 (P2) it could be seen that in 2007, the consumption was higher than in 2010 whereas the defendant claimed that their plants had grown from 1 to 3. The inspection was conducted by the plaintiff on 22 December 2011, so it was a period of more than five years from the date suspected date of meter tampering in April 2007. There was no doubt that the defendant had 'profited' a lot in terms of savings on electricity bills to be paid to the plaintiff.

[36] In my view, looking at the graphs, the steep decline from 28 April 2007 onwards until the bar rose on 1 September 2009 this was the period of consumption after meter tampering with only one production plant. Then when the bar rose on 1 September 2009, this was when the defendant's second and/or third plant was in operation. The consumption had risen because more plants were in operation (refer to Q.14 of SD2's witness statement) where SD2 stated they expended two plants in 2010. But with three plants in operation, the defendant's electricity consumption after 1 September 2009 were similar to usage during the period of consumption pre-28 July 2007 when only 1 plant had been in operation. So, the defendant found a way "to save" on electricity and was able to expand its plants so that it can produce more but at the same time kept its electricity bill within almost the same amount prior to 28 April 2007. Otherwise how does one explain the discrepancies in the graphs?

[37] I compared this situation to a land reference case; it is not the duty of the court to make its own calculations on the revenue loss that the plaintiff may claim. But it would be based on evidence and data presented by the parties before the court. At the end of the day, which evidence is more probable and whether the plaintiff has proved its claim on a balance of probabilities. I found the defendant's evidence was fraught with difficulties and inconsistencies, such that the court concluded that the plaintiff's version was more probable than the defendant's on a balance of probabilities. Therefore, the court found that the plaintiff has proved the amount of RM3,017,316.49 was fair and reasonable to be awarded to it in lieu of the loss of revenue due to the defendant's act of the plaintiff's meter tampering. It was reasonable and fair considering that the period of revenue loss for the plaintiff was more than five years.

[38] Before I end, I have to state for the record that I found the defendant's expert's explanation was unacceptable and unconvincing to me. The amount they pleaded as fair and reasonable was simply wrong in the face of the facts adduced by both parties. I need not repeat here what I had outlined earlier in this grounds of judgment in regard to his answers in cross-examination. However, I wish to highlight here that SD1 admitted that he had used the

A average method in calculating the loss of revenue suffered by TNB when he was working there for 14 years. He had also claimed to have handled three cases as an expert but then he admitted that those cases had been settled out of court, meaning that his expertise has not been tested in a full trial. He had been on TNB's side at those times.

B **[39]** Additionally, counsel for the plaintiff had managed to raise some doubt in my mind as to SD1's expertise because earlier in the cross-examination of this witness, he agreed that he did not attach any of his qualifications in a CV to the expert's report and that his expertise was just his experience with TNB on these matters. His answers in regard to his C expertise (pp. 49 to 50 of the notes of evidence) were less than satisfactory and at times, evasive. Therefore, I was not convinced with his answers in regard to his estimate on what was the fair and reasonable amount that the plaintiff could claim from the defendant.

D **Conclusion**

[40] Premised upon the above considerations, on a balance of probabilities, the court found that the plaintiff has proved its claim of loss of revenue of RM3,017,316.49 as it was a fair and reasonable amount to compensate the plaintiff. The plaintiff's claim was allowed with costs.

E Order accordingly.

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